Supreme Court, U.S.
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No. 06-534

In The Supreme Court of the United States

INITIATIVE AND REFERENDUM INSTITUTE, ET AL.,

Petitioners,

v.

GARY HERBERT, LIEUTENANT GOVERNOR OF UTAH; MARK SHURTLEFF, ATTORNEY GENERAL OF UTAH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the First Amendment prohibits a state from imposing both content- and viewpoint-based restrictions upon an initiative process with the purpose of diminishing the voice of voters who favor one viewpoint relative to those with an opposing viewpoint. The courts of appeals are in conflict on this question.

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REPLY BRIEF FOR PETITIONERS

The State contends this case presents "no circuit conflict" for the Court to resolve and accuses Petitioners of "construct[ing] one." Br. in Opp. 9. This contention contradicts the judgment of the First Circuit, which expressly rejected "the D.C. Circuit's finding that subject-matter exclusions from the initiative process 'restrict[] no speech,' [and] its conclusion that [a] selective carve-out 'implicates no First Amendment concerns.'" *Wirzburger v. Galvin*, 412 F.3d 271, 278 (1st Cir. 2005) (quoting *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002)). It also contradicts the position of the Tenth Circuit, which *sua sponte* decided to hear the present case *en banc* when the First Circuit split from the D.C. Circuit. Pet. App. 4. In the opinion below, the Tenth Circuit expressly recognized the circuit split, stating it was "[r]espectfully disagreeing with the First Circuit," and "disagree[d] with *Wirzburger*'s premise." *Id.* at 4, 39. The recent split among the circuits on the question presented in this case is deepening, and the Court should grant the Petition to resolve it.

The first half of the State's brief is spent discussing an entirely separate issue: standing. Br. in Opp. 4-8. Both the district court and the Tenth Circuit held that Petitioners have standing to bring a chilling-effect claim under the First Amendment. The State chose not to cross-petition this adverse ruling.[1] Insofar as the Court is inclined to address standing *sua sponte*, it provides yet another reason to grant the Petition, as the circuits also disagree about the contours of chilling-effect standing under the First Amendment. In any event, Petitioners advance not

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[1] *See El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999) (absent a cross-appeal, a respondent may not "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary") (quoting *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924)).

only a chilling-effect claim but also an overbreadth challenge, and therefore, the Petitioners do not have "dubious standing," as the State suggests. Br. in Opp. 8.

The second half of the State's brief *assumes* this case involves an ordinary supermajority provision (even comparing it to the Bill of Rights), instead of one specifically enacted with the intent and purpose of discriminating on the basis of viewpoint. Br. in Opp. 9-17. The State's supposition is surprising because it neither objects to the question presented by Petitioners – which says the Utah Amendment is a "viewpoint-based restriction" – nor addresses the overwhelming evidence of viewpoint discrimination. The Utah legislative sponsors made it clear that the intent and purpose (and now effect) of the Utah Amendment is: (i) "to basically make it much more difficult in the State of Utah to do an anti-hunting, anti-fishing type initiative," (ii) "definitely [to] discourage" anyone from "putting anti-hunting and anti-fishing regulations on the ballot," and (iii) to prevent "extremist groups pushing a Washington D.C. liberal agenda using ballot initiatives." Pet. 2-4. The viewpoint discrimination is confirmed by the *Amici Curiae*, who describe at length how the Utah Legislature has attempted to enshrine its pro-hunting viewpoint into perpetuity, both administratively and politically. Br. Amici Curiae 4-11 (motion pending); *see also Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 770 (2nd Cir. 1999) (provision "discriminates on the basis of viewpoint" if it "clearly seeks to discourage challenges to the status quo").

It is viewpoint discrimination that distinguishes this case from the litany of Equal Protection decisions cited by the State and instead brings this case squarely within the scope of the First Amendment. Moreover, the case provides the Court an excellent opportunity to resolve the deepening split among the circuits concerning application of the First Amendment to content- and viewpoint-based restrictions on the initiative process. If the First Amendment has any role to play when a state legislature diminishes the

value of a vote in the initiative process and thereby deters election-related speech, then this is the precise case for its application: The value of votes has been diminished and speech has been deterred, all on the basis of viewpoint. The Court should grant the Petition and resolve the circuit split on the question presented.

I. The Court Should Grant the Petition to Resolve a Circuit Split on the Question of Whether the First Amendment is Implicated Either by Diminishing the Value of Votes Based Upon the Viewpoint of Voters or by the Resultant Chilling Effect on Those Who Would Initiate Legislation or Speak in Its Favor.

The State contends the Court should deny the Petition because it already refused to resolve a circuit split described in the Petition after it first appeared in *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 1165 (2006). Br. in Opp. 13. The State even accuses the Petitioners of "inexplicably neglect[ing] to mention" the Court's denial of the petition for certiorari in *Wirzburger*. *See id.* However, there is nothing inexplicable in failing to mention a denial of a petition for certiorari. As the Court has repeatedly explained,

> [because] all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it *no implication whatever* regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.

Maryland v. Baltimore Radio Show, 338 U.S. 912, 919 (1950) (emphasis added). Apparently, the State's view is that if the Court does not hear the case in which a circuit split first appears, then the Court is thereafter forbidden from resolving the circuit split as it deepens. In truth,

however, a further deepening split presents an even greater need for the Court's attention, as is the case here. *See, e.g., McCray v. New York*, 461 U.S. 961, 961-62 (1983).

Since *Wirzburger*, the First Circuit and D.C. Circuit are split on the question of whether the First Amendment is implicated when a state removes certain subject matters from the initiative process. Pet. 13-15. After the Tenth Circuit's decision in this case, the original split remains, but the Tenth Circuit has taken the D.C. Circuit's position a step further by holding that the First Amendment also is not implicated by *viewpoint discrimination* directed at the outcome of the initiative process. Pet. 11-15. Under the rule announced by the Tenth Circuit in the present case, the First Amendment would not be implicated even if the Utah Amendment expressly required 90% approval to enact legislation favoring one viewpoint – for example, views of the Democratic Party on a given subject – while at the same time permitting any initiative expressing an opposing viewpoint to pass by bare majority (or any other percentage).

In fact, the rule adopted by the Tenth Circuit – that viewpoint discrimination directed at the outcome of the initiative process does not implicate the First Amendment – has not been adopted by any other circuit. The First Circuit's holding in *Wirzburger* – that merely removing a subject matter from the initiative process triggers intermediate scrutiny – directly conflicts with the Tenth Circuit's rule. Likewise, the Eighth Circuit's holding in *Wellwood v. Johnson*, 172 F.3d 1007 (8th Cir. 1999) – that content-based restrictions within the initiative process which impact an "independently identifiable group" implicate the First Amendment – is in tension with the Tenth Circuit's rule.[2] Pet. 8-18.

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[2] There is case law indicating that other circuits would also reject the approach adopted by the Tenth Circuit. *Biddulph v. Mortham*, 89 F.3d 1491, 1500 (11th Cir. 1996) ("We obviously would be concerned about free speech and freedom-of-association rights were a state to

(Continued on following page)

Contrary to the State's assertion, the D.C. Circuit's holding in *Marijuana Policy Project* does not embody the more extreme position taken by the Tenth Circuit. *Marijuana Policy Project* held only that the state may remove a subject from the initiative process, but it did not hold that the state may favor one viewpoint on subjects in the initiative process. 304 F.3d at 84-85. These two holdings are worlds apart. *See 44 Liquormart v. Rhode Island*, 517 U.S. 484, 510 (1996) (rejecting the argument that because a "legislature [has] the authority to totally ban a product or activity," it has the authority to regulate commercial speech within that activity); *Widmar v. Vincent*, 454 U.S. 263, 280 (1981) (state need not create a forum generally open to the public, but if it does it cannot discriminate on the basis of viewpoint); *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curium) (while state legislatures may "select the electors itself . . . [w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter"). The Court should grant the Petition and resolve the deepening split among the circuits.

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enact initiative regulations that were content based or had a *disparate impact on certain political viewpoints.*") (emphasis added); *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1015 (9th Cir. 2002) ("Courts will strike down state election laws as severe speech restrictions only when they significantly impair access to the ballot, stifle core political speech, or *dictate electoral outcomes.*") (emphasis added); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297 (6th Cir. 1993) (stating it would strike down initiative restrictions "if [plaintiffs] alleged they were *being treated differently than other groups* seeking to initiate legislation") (emphasis added).

II. The State's Attempt to Transform This Case into an Equal Protection Case Involving No Viewpoint Discrimination Should Be Rejected.

The State suggests this case involves no viewpoint discrimination, characterizing the Utah Amendment as an ordinary supermajority provision. Br. in Opp. 14-15. The State then argues this case can be easily disposed of under a string of Equal Protection decisions – despite the fact that viewpoint discrimination was not an issue in any of those decisions (most involved bond initiatives), and all but one of the decisions failed even to discuss the merits (despite the State's parentheticals suggesting otherwise).[3] Br. in Opp. 16. The one case in which the Court did reach the merits, *Gordon v. Lance*, involved no discrimination of any kind, let alone viewpoint discrimination. 403 U.S. 1, 5 (1971) ("[t]he three-fifths requirement applies equally to all bond issues for any purpose"). The State's attempt to transform this into an Equal Protection case should be rejected. The circuit split formed by decisions in the First, Eighth, Tenth, and D.C. Circuits involve the First Amendment, and it is this confusion that the Court should resolve.

The State also argues that the Court should ignore the history of the Utah Amendment, history which demonstrates impermissible viewpoint discrimination. Br. in Opp. 17. While it is understandable that the State wishes the Utah Legislature had not used the Utah Amendment to deter and diminish the value of speech it dislikes, the fact remains that it did act with just such an objective. The quotes from legislators outlining the intent and

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[3] *Bogert v. Kinzer*, 403 U.S. 914 (1971) (dismissed for want of federal question); *Mihaly v. Westbrook*, 403 U.S. 915 (1971) (vacated and remanded without discussion); *Mize v. Alhambra City Sch. Dist.*, 403 U.S. 927 (1971) (vacated and remanded without discussion); *Rimarcik v. Johansen*, 403 U.S. 915 (1971) (vacated and remanded without discussion); *Brenner v. School Dist.*, 403 U.S. 913 (1971) (affirmed without comment).

purpose (and now effect) of the Utah Amendment cannot be ignored. As described in the Petition and more fully by the *Amici Curiae*, the statements of numerous legislators embody the pro-hunting viewpoint of the Utah Legislature both prior to the Utah Amendment and throughout the enactment process, continuing to this day. Pet. 2-5; Br. Amici Curiae 4-12 (motion pending). Under the First Amendment, the principal inquiry is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). This is precisely what the Utah Legislature has done here.

The Court should grant the Petition to resolve the deepening circuit split over whether the First Amendment is implicated by content- and viewpoint-based restrictions on an initiative process that diminish the value of votes based upon the viewpoint of the voter, thereby deterring those who would initiate legislation or speak in its favor.

III. Insofar as the Court is Inclined to Address Standing as to One of Petitioners' Two First Amendment Claims, It Provides Another Reason for the Court to Grant the Petition.

The State argues Petitioners lack standing to raise a chilling-effect claim "on behalf of themselves" and a more general viewpoint discrimination claim on behalf of "potential future voters." Br. in Opp. 4. The district court rejected the State's standing arguments, and after the State cross-appealed the issue to the Tenth Circuit, the Tenth Circuit affirmed the district court's ruling. Pet. App. 8-32. The State did not cross-petition for review of the Tenth Circuit's holding on the issue of standing.

Far from providing a reason to deny the Petition, the issue of standing to raise a chilling-effect claim under the First Amendment is also an area on which the circuits disagree. In this case, the Tenth Circuit held that Petitioners have standing to bring a chilling-effect claim because

they produced "(1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so *because of* a credible threat that the statute will be enforced." Pet. App. 12. In contrast, the Eleventh Circuit last month held that "for a [chilling-effect] case to be entitled to an adjudication on the merits, there must be a substantial indication that the injury will occur and, if so, what shape that injury may take." *Elend v. Basham*, 2006 U.S. App. LEXIS 29862, at *26-*27 (11th Cir. Dec. 6, 2006). Articulating yet another standard, the Fifth Circuit recently held that "a chilling of speech because of the mere existence of an allegedly vague or overbroad statute can be sufficient injury to support standing." *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2006). Therefore, if the Court decides to address chilling-effect standing, this case would present the Court an opportunity to resolve yet another issue upon which the circuits disagree.

The State also confuses standing in the Equal Protection context with First Amendment overbreadth doctrine. Citing *Gratz v. Bollinger*, 539 U.S. 244, 284-89 (2003) (University of Michigan affirmative action case), the State asserts that "Petitioners have no standing to assert a claim that the supermajority requirement violates the free speech rights of future supportive voters, who are not before the Court." Br. in Opp. 7-8. However, "[t]he First Amendment doctrine of overbreadth was designed as a 'departure from traditional rules of standing,' to enable persons who are themselves unharmed by the defect in a statute nevertheless 'to challenge that statute on the ground that it may conceivably be applied unconstitutionally *to others, in other situations not before the Court.*'" *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 484 (1989) (emphasis added) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 613 (1973)). The State's failure to acknowledge overbreadth doctrine is especially

surprising because the Tenth Circuit specifically addressed it in the *en banc* opinion.[4] Pet. App. 44. It is difficult to understand why the State characterizes the Petitioners' ordinary overbreadth challenge as a "desperate strategy." Br. in Opp. 7.

Finally, the State confuses standing with preservation. Citing *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168 (2004) (refusing to consider a claim under a statutory provision different from the one employed in the trial and appellate courts), the State claims the question of whether viewpoint discrimination in the ballot box implicates the First Amendment is not properly before the Court because "Petitioners did not raise the issue in the court of appeals." Br. in Opp. 8. First, the State simply misunderstands preservation doctrine. What Petitioners had to preserve was their claim that the Utah Amendment violates the First Amendment, not that it violates the First Amendment for one specific reason under a single line of cases. *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (because petitioners "raised a taking claim" in the lower courts, they "could have formulated any argument they liked in support of that claim here").

Second, the issue of vote diminution based upon the viewpoint of the voter *was* before the Tenth Circuit. The dissent addressed it and concluded the injury in this case is analogous to the injury in gerrymandering cases, where the vote of a citizen in one political party is similarly rendered less effective by intentional discrimination on the basis of a voter's viewpoint. Pet. App. 57-60; *see Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("even if this were a claim not raised by petitioner below, we would ordinarily feel free to address it since it was addressed by the court below").

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[4] Petitioners also have standing independent of overbreadth doctrine. Petitioners do not bring their First Amendment challenge on behalf of *other* voters, as some of the Petitioners are themselves registered voters.

All of the Petitioners, as well as the question they present, are properly before the Court. Therefore, this case provides an ideal opportunity for the Court to resolve the deepening circuit split concerning the scope of the First Amendment in the initiative context, an issue of growing importance affecting state legislatures and voters across the nation.

* * *

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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